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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM A. D. 1945

No. 231

ARKANSAS NATURAL GAS CORPORATION,
Petitioner,

versus

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of The United States:

Petitioner, Arkansas Natural Gas Corporation, presents its petition for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and in support thereof respectfully shows:

STATEMENT OF THE MATTER INVOLVED.

This is a civil action instituted by Petitioner by the filing, on June 8th, 1944 (R. 6) in the Fifth Circuit Court

of Appeals, of its petition for review, under Section 24 of the Public Utility Holding Company Act of August 26, 1935, [1] of an order issued by the Securities and Exchange Commission, May 5, 1944, under Section 11 (b) (1) of the Act, 15 USCA, Section 79k (b) (1) [2], requiring Petitioner (a registered holding company under the Act) to divest itself of ownership and control of its subsidiary corporations engaged in the production, transportation, refining and marketing of petroleum and petroleum products. (R. 5-20).

The Commission instituted proceedings under the Act against Petitioner and its subsidiary companies [3] by its order of July 3, 1941 (R. 7), stating it appeared to the Commission that:

"The holding company system of Arkansas Natural Gas Gas Corporation is not confined in its

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(1) 49 Stat. 803, 15 USCA, Sec. 79x.

(2) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding company system of which such company is a part to a single integrated public utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public utility system:

* * * * * *

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public utility systems the retention of an interest in any business (other than the business of a public utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

(3) Petitioner is a subsidiary of Cities Service Company. The order was directed also to Cities Service Company and its other subsidiaries, but this review concerns only Petitioner and its subsidiaries.

operations to those of an integrated public utility system as provided by Section 11 (b) (1) of the Act or to such single system and additional systems which may be retained under Clauses (A), (B) and (C) of said section and to such other businesses as are reasonably incidental or economically necessary or appropriate to the operations of such system or systems." (R. 27).

and requiring answer to the allegations of the order by August 2, 1941. (R. 29).

Petitioner and its subsidiary companies answered August 1, 1941, denying the allegations of the order with reference to such companies and alleging in response thereto that Petitioner's holding company system consisted of an integrated natural gas public utility system as defined in the Act and "other businesses" consisting of oil production, transportation, refining and marketing properties, which were reasonably incidental and economically necessary and appropriate to the operations of the integrated utility system and were retainable by Petitioner under Section 11 (b) (1) as necessary or appropriate in the public interest and for the protection of investors and consumers and not detrimental to the proper functioning of Petitioner's utility system. (R. 38).

Hearings before the Commission with reference to the issues thus formed were commenced October 28, 1941,

and concluded November 19, 1941. Petitioner's evidence offered at such hearings, and which was not contradicted or rebutted disclosed the following facts:

The holding company system of Petitioner (the only holding company in the system) consists of the following:

1. Arkansas Louisiana Gas Company	100% of capital stock.
Gas Advisers, Inc.	26% of capital stock.
2. Arkansas Fuel Oil Company	100% of capital stock.
Arkansas Pipeline Corporation	100% of capital stock.
Arkana Transit Corporation	40% of capital stock.
Orange State Oil Company	99.999% of capital stock.
Petroleum Advisers, Inc.	17% of capital stock.
The Penn Wyo Trust	21.9% of capital stock.
The Atlantic Oil Company	100% of capital stock.
The Columbus Oil Company	100% of capital stock.
The Phebus Oil Company	100% of capital stock.
3. Lisbon Gasoline Company, Inc.	50% of capital stock.
4. Transark Oil & Gas Company	50% of capital stock.

(R. 224).

Of such subsidiaries, only Arkansas Louisiana Gas Company is a public utility within Section 2 (a) (4) of the Act, 15 USCA, Section 79b (a) (4) (5). [4] That company operates an admittedly integrated gas utility system in East Texas, North Louisiana and Arkansas. (R. 651).

The other subsidiaries are producers, transporters, refiners and marketers of petroleum and petroleum products, operating largely within the area of the gas company's operations, except Transark Oil and Gas Company which owns and operates a single gas well in the State of Wyoming and Petroleum Advisers, Inc., and Gas Advisers, Inc.,—mutual service companies. (R. 652).

Notwithstanding the only evidence offered shows that retention of the oil business in the same holding company system with the gas utility inures to the benefit of consumers of natural gas and investors in the securities of the holding company, since the joint operation of these two businesses results in annual savings of more than $200,000.00 to the gas utility, or more than 21% of its net income; and to the oil business of more than 42% of its net income; the oil business serves the gas utility through its gasoline extraction plants by removing liquid hydrocarbons from the gas to eliminate the hazards incident to

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[4] Sec. 2. (a) When used in this title, unless the context otherwise requires—

(4) "Gas utility company" means any company which owns or operates facilities used for the distribution at retail (other than distribution only in enclosed portable containers, or distribution to tenants or employees of the company operating such facilities for their own use and not for resale) of natural or manufactured gas for heat, light or power. (Sec. 2. (a) (4).)

(5) "Public-utility company" means an electric utility company or a gas utility company. (Sec. 2. (a) (5).)

wet gas; the joint operation results in lower interest rates and better bank credits, in the acquisition of gas reserves and the conservation of both oil and gas and the joint operations are not detrimental to the functioning of the gas utility but actually beneficial and in no respect impedes or hinders public regulation, the Commission in its findings and conclusions accompanying its order of May 5, 1944 (R. 594), determining the issues, concluded that Petitioner's oil business "as a whole" is not retainable under the "other business" standards of Section 11 (b) (1) because the link at which the oil operations are joined, operationally, to the utility operations ends with production properties and thus the oil transportation, refining and marketing properties are not retainable, although the Commission found the evidence "shows at great length the affinity between oil and gas production, the close operating relations of Arkansas Oil and Arkansas Gas, which are under common management, the treatment of natural gas by plants of the oil company, and a number of operating savings and financial advantages achieved by joint operation of the two companies". (R. 652-653).

While the Commission recognized the economies and advantages flowing to investors, consumers and the general public by joint operation of the oil and gas properties, it denied retention of the oil properties in the same holding company system with the gas utility company because such oil properties, in their entirety, are, so it found, not functionally related to the operations of the gas utility. This holding was predicated on the Commission's erroneous interpretation of the Act as requiring such a functional relationship to permit retention.

On June 8th, 1944, within the 60 day limitation provided in Section 24 of the Act, Petitioner filed, in the Honorable Fifth Circuit Court of Appeals, its petition to review the order of the Securities and Exchange Commission, (R. 5) urging, among other specifications of error, that:

> "The Commission erred in finding without any evidence in support thereof and contrary to substantial evidence that while a portion of the intergrated oil business of Petitioner may be said to be reasonably incidental or economically necessary or appropriate to the operations of the natural gas public utility, other parts thereof are not and that such oil business as a whole is not reasonably incidental or economically necessary or appropriate to the operations of the utility."
>
> "The Commission erred in finding that even if it were required to construe the 'second other business' clause of Section 11 (b) (1) of the Act as an exclusive standard, the proof in this proceeding does not satisfy the requirements of the Act by construing the Act to impose an additional requirement not set forth in Section 11 (b) (1), namely, that a retainable non-utility business must bear an operating relationship to the retainable public utility."
>
> "The Commission erred in making its findings as to the reasonable incidence, economic necessity and appropriateness of the oil business of Petitioner to the operations of the utility in not finding that the retention of such non-utility business is

necessary or appropriate in the public interest or for the protection of investors or consumers and is not detrimental to the proper functioning of the integrated utility system, since there is substantial and sufficient evidence, and none to the contrary, in this proceeding to constitute adequate proof in support of each of such findings."

The Honorable Fifth Circuit Court, in its opinion, dated March 22, 1946 (R. 829) recognized that under Section 11 (b) (1) of the Act a holding Company may retain a non-utility business along with a single integrated public utility system without the existence of a functional relationship between such businesses if the retention of the non-utility business by the holding company is necessary or appropriate in the public interest or necessary or appropriate for the protection of investors or necessary or appropriate for the protection of consumers—any one of the three—and is not detrimental to the functioning of the utility system, but found that "no case is made here of the public interest or protection of investors and consumers making necessary the retention of these oil businesses" (R. 831). The opinion of the Fifth Circuit Court rendered March 22, 1946, is not yet reported.

Petitioner filed its petition for rehearing in the Honorable Fifth Circuit Court on April 9th, 1946, directing the Court's attention to the fact the Securities and Exchange Commission had not passed upon the evidence in this case in the light of the proper interpretation of the Act, as construed by the Court; that the finding of facts in the presence of evidence and in the light of the Act as

properly construed is the province of the Commission unless the weight of evidence establishes such facts, as a matter of law, and that the evidence offered before the Commission by Petitioner is sufficient, as a matter of law, to require the Court, after interpreting the Act, to set aside the order of the Commission and enter its decree permitting Petitioner to retain its gas utility and oil properties in its holding company system. Petitioner prayed that the Commission's order be so modified, or set aside and the case remanded to the Commission for further proceedings. (R. 835).

The petition for rehearing was overruled, without comment, on May 15th, 1946.

JURISDICTION.

This Honorable Court has jurisdiction under United States Code, Title 28, Section 347 (Judicial Code, Section 240, amended) to grant this petition for certiorari.

QUESTIONS PRESENTED.

Question No. 1: Should the Honorable Fifth Circuit Court, after properly construing Section 11 (b) (1) of the Holding Company Act and in the light of controlling and undisputed evidence of economies and advantages flowing from joint management and control of Petitioner's oil business and gas utility business, have modified the order of the Securities and Exchange Commission and permitted the retention of these properties in the same holding company system?

Question No. 2: Should not the Honorable Fifth Circuit Court, upon rejecting the Securities and Exchange Commission's interpretation of the Public Utility Holding Company Act of 1935 as requiring a functional or operational relationship between the utility and non-utility properties to permit retention thereof in the same holding company system, have remanded the case to the Commission for further consideration of the evidence and findings since the Commission has not made findings under a proper construction of Section 11 (b) (1) of the Act?

Question No. 3: Has not the Honorable Fifth Circuit Court invaded the province of the Securities and Exchange Commission in passing upon the weight of evidence under a correct interpretation of Section 11 (b) (1) of the Public Utility Holding Company Act of 1935—a question which the Commission had not previously passed upon?

REASONS FOR ALLOWANCE OF THE WRIT.

1. An important question of federal law which has not been, but should be, settled by this Court is involved in this proceeding. Interpretation of the Public Utility Holding Company Act of 1935, from the standpoint of the character of evidence required to satisfy the conditions of the Act for retention of non-utility properties and utility properties in the same holding company system, is required for final determination of the issues.

The first "other business" clause of Section 11 (b) (1) of the Act provides the Commission "shall take such action as the Commission shall find necessary to limit the operations of the holding company system of which such company is a part to a single integrated public utility system and to such other businesses as are reasonably incidental or economically necessary or appropriate to the operations of such integrated public utility system". The second "other business" clause of that section says "The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public utility systems the retention of an interest in any business (other than the business of a public utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems". The Act sets forth no test of what constitutes a business reasonably incidental or economically necessary or appropriate to the operations of the utility system or necessary or appropriate in the public interest or for the protection of investors or consumers, and not detrimental to the proper functioning of the utility system.

In the words of the Commission the evidence here "shows at great length the affinity between oil and gas production, the close operating relations of Arkansas Oil and Arkansas Gas, which are under common management,

the treatment of natural gas by plants of the oil company, and a number of operating savings and financial advantages achieved by joint operation of the two companies" (R. 653), yet the Honorable Fifth Circuit Court of Appeals concluded that "No case is made here of the public interest or protection of investors and consumers making necessary the retention of these oil businesses." (R. 838).

The nation wide importance of the question to the utility industry, the consuming public, and the investors in the industry makes it timely for the Court to grant this writ and review the case.

2. The decree of the Honorable Fifth Circuit Court is in direct conflict with that of the Honorable United States Court of Appeals for the District of Columbia in Engineers Public Service Company versus Securities and Exchange Commission, 138 F. (2d) 936, now pending in this Honorable Court on certiorari and assigned for reargument during the week of October 14th. The court in the Engineer's case gave the second "other business" clause of Section 11 (b) (1) of the Act the same interpretation as did the Fifth Circuit Court, and eliminated the Commission's functional or operational requirement, but remanded the case to the Commission for further consideration of the evidence under the Court's interpretation, as the Commission had not considered the evidence in the light of that interpretation.

The Court of Appeals of the District of Columbia set out the sort of evidence deemed sufficient under the Act thus, at page 949:

"The joint operation of the business has been conducted with the permission of the State of Virginia and has been efficient and advantageous to consumers. There has been joint use throughout of personnel and property; 13.8 per cent of the transportation employees also perform services for the electric department and a total of 305 employees ranging from executives to minor employees render service to both systems. Joint use is made of property of the value of $2,750,000 which includes office buildings, storage facilities, automotive equipment, poles, manholes, rights of way, etc. The transportation system derives all of its electric energy (at a cost in 1940 of $218,000) from the electric department which has provided special facilities for that purpose. The transportation department furnished free transportation to electric employees to the extent of $108,000 in 1940.

"The trolley service has gradually declined and the bus service has gradually grown until it is now slightly over 50 per cent of the whole. The railway system in 1940 received gross operating revenues of $2,447,000 but a net operating deficit of $43,000. The bus properties received gross operat-

ing revenues of $2,580,000 and net operating revenues of $151,000 so that the gross income (after depreciation) from the transportation department was $106,000. The net income in 1940 was $24,-800. For years the transportation operations as a whole have produced a regular but small annual net profit. Studies offered by accountants indicated economies from joint operation amounting to $249,000 a year, of which $108,000 was credited to free transportation allowed electric employees. The Commission doubted whether a saving was actually made through the free transportation service."

* * * * * * * * *

"From this outline it appears that substantial evidence was presented from which the Commission might have found that the retention of the transportation business was necessary in the public interest or for the protection of investors or consumers, or if not necessary, at least appropriate for these purposes in the ordinary acceptation of these terms; but in the absence of functional relationship between the transportation business and the electric system, no such finding could be made under the Commission's interpretation of the Act."

The evidence in Petitioner's case, summarized under Statement of the Matter involved above, is stronger,

broader and more favorable to retention of the non-utility properties than that in the Engineers Public Service Company case. Yet the Honorable Fifth Circuit Court concluded "no case is made", while the District of Columbia Court under evidence attacked by the Commission as inaccurate, concluded to the contrary, or that that determination should be by the Commission. The Commission in the instant case has not attacked, but has admitted, the accuracy and substantial character of Petitioner's evidence.

Should certiorari be denied Petitioner and thereafter this Honorable Court affirm the decision of the United States Court of Appeals for the District of Columbia in the case of *Engineers Public Service Company v. Securities and Exchange Commission*, the controlling authority of the decision of this Honorable Court in that case will be unavailing to Petitioner and its right to retain its oil business with its single integrated gas utility will be lost, although supported by evidence stronger and broader than the evidence on the same issue in the *Engineers* case.

Wherefore, Petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 11,052,

Arkansas Natural Gas Corporation, Petitioner, versus Securities and Exchange Commission, Respondent, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem proper.

HENRY C. WALKER, JR.,
JOHN O. WICKS,
Counsel for Petitioner.

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No.

ARKANSAS NATURAL GAS CORPORATION,
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versus

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

This brief is respectfully submitted by Petitioner, Arkansas Natural Gas Corporation, in support of the foregoing Petition for Writ of Certiorari.

OPINION OF THE COURT BELOW.

The Honorable Fifth Circuit Court's opinion (R. 829) rendered March 22, 1946, is not yet officially reported.

JURISDICTION.

This Court has jurisdiction to grant the Writ applied for under United States Code, title 28, section 347 (Judicial Code, section 240 amended). *Otis & Company v. Securities and Exchange Commission, 323 U. S. 624, 89 L. ed. 460.*

The proceeding was instituted by order of the Securities and Exchange Commission on July 3, 1941. The order of the Commission is dated May 5, 1944. Petition to review the Commission's order was filed in the Honorable United States Circuit Court of Appeals for the Fifth Circuit on June 8th, 1944, within the time limitation provided by Section 24 of the Public Utility Holding Company Act of 1935. The Honorable Circuit Court's opinion was rendered March 22nd, 1946. Petitioner's petition for rehearing was filed April 9th, 1946 and denied May 15th, 1946.

STATEMENT OF THE CASE.

A summary statement of the nature of this proceeding is set forth in the preceding petition for writ of certiorari. Additional facts will be developed in the argument to follow.

SPECIFICATION OF ERRORS.

1. The Honorable Fifth Circuit Court, construing Section 11 (b) (1) of the Public Utility Holding Company Act of 1935 as not requiring a functional relationship between utility and non-utility properties, contrary to the interpretation of the Securities and Exchange

Commission, erred in failing to modify the Commission's order to permit retention of Petitioner's oil business together with its integrated gas utility system since the only evidence in the record shows, as a matter of law, that such retention is necessary or appropriate in the public interest, for the protection of investors and consumers, and is not detrimental to the functioning of the utility.

2. At least the Honorable Fifth Circuit Court, upon properly construing the Act, erred in not remanding the cause to the Securities and Exchange Commission for further consideration of the evidence and findings in the light of the Act as properly construed, since the Commission had made no findings from the evidence except under its erroneous interpretation of the Act.

ARGUMENT.

The Honorable Fifth Circuit Court, construing Section 11 (b) (1) of the Public Utility Holding Company Act of 1935 as not requiring a functional relationship between utility and non-utility properties, contrary to the interpretation of the Securities and Exchange Commission, erred in failing to modify the Commission's order to permit retention of Petitioner's oil business together with its integrated gas utility system since the only evidence in the record shows, as a matter of law, that such retention is necessary or appropriate in the public interest, for the protection of investors and consumers, and is not detrimental to the functioning of the utility.

It is evident from a reference to the Commission's opinion that it did not base its divestment order on the failure of Petitioner's evidence adequately to show advantages and economies accruing to Petitioner, its investors, to the public and to its gas consumers from retention of the oil business in Petitioner's holding company system. Its order was predicated on its interpretation of the Act as requiring a functional or operational relationship between the utility and non-utility properties before retention could be permitted (R. 654).

The Commission describes the utility system thus:

> "The production, transmission and distribution properties of Arkansas Gas are all located in the same general area in the States of Arkansas, Louisiana and Texas. The main body of the area forms a rough triangle, encompassing approximately 31,000 square miles, with the base of the triangle in northern Louisiana and its apex in lower Arkansas. Lines run west into East Texas and north into upper Arkansas. Within this area, which has a population of over 1,500,000, the company has 103 distribution plants (63 in Arkansas alone), all coordinated with the production and transmission properties so that at all times the requirements of each outlet are anticipated and can be satisfied. The distributing system is divided into 33 field offices, each possessing local control, but all subject to general coordinating authority from the company's main offices, located at Shreve-

port, Louisiana. We find that Arkansas Gas operates a single integrated gas utility system." (R. 651).

The evidence, and the only evidence, in the record here shows annual savings to the Petitioner by the operation of its oil business together with its gas utility business of $405,987.00, of which $223,735.00 accrues to the utility and $182,252.00 to the non-utility properties, for the year ending December 31, 1940. (R. 569-592). The integrated gas system had gross revenue of $8,119,411.00, net income of $1,033,601.00 and operating expenses of $6,093,-742.00. (R. 145-146). Thus the annual savings to the gas properties effected by joint operation with the oil properties is approximately 3% of its gross income, more than 21% of its net income and nearly 4% of its operating expenses. For the same year the oil properties had net income of $430,638.00. (R. 158). The annual savings to the oil properties, therefore, amount to more than 42% of its net income.

In addition to such savings and economies, the evidence shows that the joint Geological and Land Departments result in very substantial benefits to the gas property by considerably increasing the natural gas reserves behind the gas transmission and distribution facilities through the transfer to the gas company, at cost, of gas discovery wells and the conservation of gas produced with oil which otherwise would be wasted. (R. 60-61, 236-237, 360-361, 431-457, 482-483, 535). This conservation of gas is not only in the interest of the utility, but is in the interest of the public as well. The oil company renders a

necessary service to the utility by operation of its gasoline plants in removing liquids contained in wet gas, which operation is necessary to eliminate the hazard of using wet gas in the utility's lines. (R. 314-315, 338-339, 364-365, 399-400, 410-413, 512-513). Bank credit is enhanced by the common operation and both the operating gas and oil properties, and Petitioner, have received the benefit of lower interest rates thereby. (R. 540-547). The economies effected have reduced the utility's rates to its consumers as, under public regulation, any savings to the utility beyond the return permitted by regulation inures to the benefit of the consumer through the reduction of rates. (R. 314-317, 338, 340). These facts are established by the testimony of such witnesses as Bell, Vice President of the Republic National Bank of Dallas, Texas, a bank which is thoroughly conversant with the securities of oil and gas companies situated in the Mid-Continent oil and gas field; Murrell, President of the Commercial National Bank in Shreveport, Louisiana, as to which institution the same comment may be made; Cleveland, the President of Guaranty Trust Company of New York, and Ruddick, a member of the investment firm of Smith, Barney & Co., each of whom is familiar with Petitioner's oil and gas properties and stated the reasons supporting their conclusions that the investments of public and private investors owning Petitioner's securities would be adversely affected by the divorcement of the gas and oil businesses and that the retention of the oil business with the utility was for the protection of investors. (R. 544-549, 538-543, 398-406). Lasley, author of the Arkansas Public Utility regulatory law and the first Chairman of the Department

of Public Utilities of the State, and Counsel of that Commission when this cause was before the Securities and Exchange Commission and who instituted the last general investigation and rate proceeding of the gas utility company, lasting several years and reviewing every phase of the business of that utility and its relation to and joint operation with the Petitioner's oil business; and Mehlburger, who was the engineering member of the same Arkansas Commission at such time and during such proceeding, testified that they were intimately acquainted with the operations of the two businesses; that there was subsantial saving to the companies and particularly to the utility, and, therefore, to the consuming public, permitting the reduction of rates, by the joint operation of these businesses and that such joint operation was in no respect detrimental to the functioning of the utility. (R. 305-310, 315, 318, 326-328, 330-333, 337-345, 347, 349).

Large stockholders living in widely scattered sections of the United States testified that they were familiar with the operations of Petitioner's gas utility and oil business from inception; that each of them was the owner of large investments in the securities of Petitioner resting entirely on the subsidiary utility and oil companies of Petitioner and that they believed divorcement of such businesses would have a very serious adverse effect and that the retention in the same holding company system was manifestly for the protection of investors. They testified that they had contacted large numbers of private investors and without exception the opinion they expressed was that of those whose opinion they had sought. (R. 380-397, 354, 358, 360-367, 557-559).

The Commission, in its opinion, did not dispute these facts, but on the contrary, said:

> "The proof adduced to support the retainability of Arkansas Oil and its subsidiaries resembles the evidence relating to Cities Service Oil discussed in detail earlier in this opinion. It shows at great length the affinity between oil and gas production, the close operating relations of Arkansas Oil and Arkansas Gas, which are under common management, the treatment of natural gas by the plants of the oil company, and a number of operating savings and financial advantages achieved by joint operation of the two companies." (R. 652-653).
>
> * * * * * * * * *
>
> "We think the record demonstrates the truth of respondents' contention that the Oil and Gas Companies are closely related in many aspects. But it will be noted that the operational relation between the companies exists only in the gas production and conditioning phases, and not directly at any other point. When the crude oil and the natural gas have left the well mouth and the latter has been conditioned, the operational relation between the Gas Company and the Oil Company disappears." (R. 613).

While thus recognizing the economies and advantages resulting from the joint operation of the oil and gas properties, the Commission entered its divestment order against Petitioner as it interpreted Section 11 (b)

(1) of the Act to require the non-utility properties to be functionally or operationally related to the utility properties before their retention was permissible under the Act.

The Honorable Fifth Circuit Court rejected the Commission's interpretation of Section 11 (b) (1). Interpreting this section, the Court said:

> "That section puts the duty on the Commission to require Petitioner, as a holding company registered under the Act, to limit its operations to 'a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system.' The next words require that the holding company shall be permitted to continue to control additional public-utility systems under certain conditions, which we need not consider since only one system is here involved. The statute then recurs to the subject of 'other businesses' in these words: 'The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.' This sentence is not a redefining of the 'other businesses' previously mentioned as retain-

able, but is an enlargement, an addition thereto. In the first mention the operations of the utility system are in the foreground, and what is merely incidental to them, or what is economically necessary or appropriate to them may be retained. In the second mention of the other businesses the public interests, and the protection of investors and consumers are in the foreground, and retentions necessary and appropriate to protect these are permissible additionally, if not detrimental to the proper functioning of the system." (R. ~~832, 833~~). 831/

Eliminating, then, as the Court did, the requirement of an operational relationship between the oil and gas properties, the evidence and the Commission's findings as well show retention of Petitioner's oil properties with its gas utility to be in the public interest, for the protection of investors and for the protection of consumers and the Court, under such circumstances, should have rendered judgment for Petitioner.

> "The general rule that the appellate court may, on reversal, render or direct final judgment is particularly applicable where the facts of the case have been fully developed on the trial."
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> "Final judgment may also be rendered or directed where the facts of the case are undisputed by reason of the evidence being without material conflict or otherwise, and only a question of law is involved."
>
> *5 C. J. S., Section 1925, pp. 1429 and 1431.*

This Honorable Court in *Securities and Exchange Commission v. Chenery Corporation, 318 U. S. 80, 87 L. ed. 626,* said:

> "Congress has seen fit to subject to judicial review such orders of the Securities and Exchange Commission as the one before us. That the scope of such review is narrowly circumscribed is beside the point. For the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review. If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law."

At least the Honorable Fifth Circuit Court, upon properly construing the Act, erred in not remanding the cause to the Securities and Exchange Commission for further consideration of the evidence and findings in the light of the Act as properly construed, since the Commission had made no findings from the evidence except under its erroneous interpretation of the Act.

The Commission has viewed the evidence in this record only with its erroneous interpretation of the Act in mind. It has never applied the test of the "second busi-

ness" clause of the Act, in the light of the Court's interpretation, to say that Petitioner's oil properties cannot be retained. This was the state of the record as the cause reached the Fifth Circuit Court.

That Court has held the Commission was in error in construing the Act as requiring the functional or operational relationship. The second "other business" clause, said the Court, "is not a redefining of the 'other businesses' previously mentioned as retainable, but is an enlargement, an addition thereto. * * * In the second mention of other businesses the public interests, and the protection of investors and consumers are in the foreground, and retentions necessary and appropriate to protect these are permissible additionally, if not detrimental to the proper functioning of the system." (R. ~~832, 833~~ 631)

After so construing the Act, however, the Court proceeded to pass upon the sufficiency of the evidence to permit Petitioner to retain its oil businesses when it said "No case is made here of the public interest or the protection of investors and consumers making necessary the retention of these oil businesses." (R. 832).

Petitioner submits that in so doing the Court invaded the province of the Commission and, in the absence of rendering a decree for Petitioner, the Court should have remanded the case to the Commission for further proceedings not inconsistent with its opinion.

In not so remanding the Honorable Fifth Circuit Court failed to follow the proper rule as laid down by this

Court in *Securities and Exchange Commission v. Chenery, 318 U. S. 80, 87 L. ed. 626, at pp. 633 and 636:*

"It is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. Like considerations govern review of administrative orders. If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency."

* * * * * * * * *

"It is not for us to determine independently what is 'detrimental to the public interest or the interest of investors or consumers' or 'fair or equitable' within the meaning of Sections 7 and 11 of the Public Utility Holding Company Act of 1935. The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act. There must be such a responsible finding."

Too, the Court's action was contrary to that of the Honorable United States Court of Appeals for the

District of Columbia in *Engineers Public Service Company v. Securities and Exchange Commission, 138 F. (2d) 936*, as appears in the foregoing petition for Writ of Certiorari. That Court remanded the case to the Commission for further proceedings on evidence less substantial than that presented here. Since it was the Commission's, not the Court's, province to pass upon the weight and sufficiency of the evidence under a proper construction of Section 11 (b) (1) of the Act, unless the evidence, as a matter of law, justified the Court's rendering judgment for Petitioner, and since it appears that should certiorari be denied Petitioner and thereafter this Honorable Court affirm the decision of the United States Court of Appeals for the District of Columbia in the case of *Engineers Public Service Company v. Securities and Exchange Commission, 138 F. (2d) 936*, the controlling authority of the decision of this Honorable Court in that case will be unavailing to Petitioner and its right to retain its oil business with its single integrated gas utility will be lost although supported by evidence stronger and broader than the evidence on the same issue in the *Engineers* case, it seems proper for this Honorable Court to grant the Writ of Certiorari applied for.

Respectfully submitted,

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